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Also, that certain coverage is required should not preclude maintaining optional forms of insurance. To encourage this, accounting for collateral sources would only be required in the specified compulsory forms of coverage. Even if these ideas do not alleviate court congestion and some of the fraudulent claims that cause the congestion, it does not seem extravagant to suggest the addition of one or two members to the local bench. The proper interest should not be economy, but rather a fair and appropriate system of compensating loss.

VII. CONCLUSION

The Keeton-O'Connell proposal goes too far in certain aspects and not far enough in others. Their complicated system of exclusions and deductions leaves them open to justifiable criticism. Their concern for the injured pedestrian is laudable, but, because of this concern, their program was challenged as an added inducement for fraudulent claims. The concept of "net economic loss" lends itself to the interpretation that "basic protection" was no protection at all.

Retaining contributory fault principles to handle liability claims over certain limits in the face of their severe criticism of the fault system was simply inconsistent. Moreover, Keeton and O'Connell were content to provide for voluntary liability insurance to cover judgments over the basic protection amounts. Disparaging of fault, they would have permitted compensation for personal irresponsibility. Perhaps these inconsistencies arose because of the authors' concern for the "practical politics" of obtaining acceptance for such a proposal. If this is so, it is ironic that this practical aspect is the underlying cause for the criticism levied against their plan.

Certainly there is much that can be said in favor of the Keeton-O'Connell proposal, but in its present form it is not the answer. What this proposal has accomplished is to vitalize the dialogue attempting to remedy the flaws in the present system. This is a valuable achievement in itself. Hopefully the end product of the debate will be a fair and workable plan to compensate loss in the automobile accident area.

ROBERT B. CONKLIN

TITLE TO GOODS: THE POSITION OF THE PURCHASER AT COMMON LAW AND UNDER THE UNIFORM COMMERCIAL CODE

Under common law, the bona fide purchaser long received dichotomous treatment from commercial law. Some complained that the bona fide purchaser was being protected to the detriment of merchants, while others argued that the protection afforded the bona fide purchaser should be increased to promote the free transfer of goods.¹ The fact that these arguments were often couched

1. See Vold, *Worthless Check Cash Sales, "Substantially Simultaneous" and Conflicting Analysis*, 1 Hastings L.J. 111, 121 (1949). He refers to the treatment of bona fide purchasers as being "Janus-faced."

in abstract legal terms, such as voidable title, apparent authority and conditional sale, with little attention being paid to current economic and social conditions, led to the result that the law in this area was generally inconsistent and incongruous.

Recently, there has been a statutory effort to crystallize and update the law concerning the protection of a bona fide purchaser through the enactment of Uniform Commercial Code 2-403 [hereinafter referred to as UCC or Code], which treats disputes between owners and purchasers over the title to goods.² In order to assess the changes made by the UCC in this area, and the impact these changes have had, the Code must first be examined in the context of the common law.³

THE COMMON LAW

General Rule

Under common law, no one could convey a better title to goods than he had.⁴ As a result, the owner of goods usually could recover them from a purchaser who received such goods from a fraudulent transferor. This common law rule was based on two premises. First, it was designed to insure the solvency of owner-merchants by assuring that they received value for their goods and were not divested of them by a purchaser who took from a fraudulent transferor.⁵ Secondly, the rule followed from the common law determination that purchasers should assure themselves of their vendor's title and, since their failure to do so made the fraudulent transfer possible, they should bear the loss caused by that transfer.⁶

Bona Fide Purchasers

The common law provided an exception to the rule that no one could convey a better title to goods than he had in instances wherein it was clear that the owner was responsible for allowing the fraudulent transferor to cause the loss. The theories of voidable title and estoppel implemented this exception, and in order to be protected the purchaser had to bring himself within one of them.

2. Throughout this comment, the terms owner, transferor and purchaser will be used to refer to the parties involved. Owner refers to the person originally having title to the goods; see *Powell v. Home Indemnity Co.*, 343 F.2d 856 (8th Cir. 1965); *Coyle v. Swanson*, — Mass. —, 185 N.E.2d 906 (1962). Transferor refers to the middleman who obtains the goods from the owner and conveys them to the purchaser: see *Credit Bureau of San Diego v. Wolf*, 93 Cal. App. 2d 761, 209 P.2d 828 (1949); *Corning Glass Works v. Max Dichter Co.*, 102 N.H. 505, 161 A.2d 569 (1960). Purchaser refers to the person who obtains the goods from the transferor; see *Giustina v. United States*, 190 F. Supp. 303 (D.C. Ore. 1960); *Pearson v. Allied Fin. Co.*, 336 S.W.2d 6 (Mo. 1963).

3. The UCC is presently in force in every state except Louisiana. However, it is only uniform to the extent that it displaces the common law, which varied greatly from state to state.

4. See *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332 (1882); *R. Benjamin, Sale of Personal Property* 11 (7th ed. 1889); *J. Jones, Bona Fide Purchase of Goods* 4 (1921).

5. *J. Jones, supra* note 4, at 4.

6. *Id.* at 49-50; *L. Vold, Law of Sales* 173-75 (2d ed. 1959).

For either theory to apply, however, the buyer first had to establish that he was a bona fide purchaser. A bona fide purchaser was generally defined by the common law as one who (1) in good faith (2) purchased goods (3) for value (4) in the ordinary course of business (5) without knowledge that his purchase was in violation of the rights of a third party in the goods.⁷ To understand the operation of the common law in this area, it is necessary to examine each requirement of this definition in some depth.

The first requirement of good faith was roughly equivalent to honesty, but definitive legal standards were lacking. If the purchaser was a merchant, courts referred to trade practices as establishing the good faith standard.⁸ However, there were no such standards applicable to non-merchant purchasers. Courts said that negligence alone did not show bad faith, but this principle was qualified by the fact that most courts held the purchaser to a standard of reasonable care in ascertaining the adequacy of his transferor's title:⁹ if he were negligent in checking on his transferor's title, he was often found to have constructive notice of his transferor's defective title.¹⁰ Of course any evidence of collusion between the transferor and purchaser established bad faith.¹¹

Secondly, the requirement of a purchase excluded taking by devise, which was usually covered by Wills Acts and property law.¹² Goods included any tangible that could be transferred in a commercial transaction.¹³ As a general rule, certain intangibles such as accounts and contract rights fell within this concept,¹⁴ but it did not include negotiable instruments and security instruments.¹⁵ While a holder in due course differed from a bona fide purchaser, courts usually applied the definition of a bona fide purchaser to transactions dealing with the assignment of chattel mortgage agreements.¹⁶

The next concept, value, was synonymous with sufficient consideration.¹⁷ Thus, under common law doctrine, a purchaser who bought a television set

7. See, e.g., *Frankish v. Federal Mortgage Co.*, 30 Cal. App. 2d 700, 87 P.2d 90 (1939); *Fane Dev. Co. v. Townsend*, 381 P.2d 1012 (Okla. 1963); *Newman v. Coker*, 310 S.W.2d 354 (1958); *J. Jones*, *supra* note 3, at 14-30.

8. *Cf. Finance Guaranty Co. v. Defiance Motor Truck Co.*, 145 Md. 94, 125 A. 585 (1924).

9. This rule was usually limited to situations where the exercise of reasonable care would have led to discovery of the transferor's defective title. See *American Surety Co. v. 1st Nat'l Bank in W. Union*, 50 F. Supp. 180 (N.D.W.Va. 1943); *Orso v. Cater*, 272 Ala. 657, 133 So. 2d 864 (1961); *Henschke v. Christian*, 228 Minn. 142, 36 N.W.2d 547 (1949); but see *Whayne v. Seamans*, 95 Okla. 168, 217 P. 859 (1923).

10. See, e.g., *University of Richmond v. Stone*, 148 Va. 686, 139 S.E. 257 (1927).

11. See *Davidson v. Corner*, 254 Ala. 38, 46 So. 2d 832 (1950); *C. Jon Dev. Corp. v. Pond-Porsche Corp.*, 69 Ill. App. 469, 217 N.E.2d 416 (1966).

12. *Alexander v. O'Neil*, 77 Ariz. 91, 267 P.2d 730, 733 (1954).

13. *Jones*, *supra* note 4, at 9-13.

14. *Cf. 1st Nat'l Bank of Ottawa v. Kay Bee Co.*, 366 Ill. 202, 7 N.E.2d 860 (1937).

15. See *Associates Discount Corp. v. Old Freeport Bank*, 421 Pa. 609, 220 A.2d 621 (1966); see also 2 S. Williston, *Sales* 606 (rev. ed. 1948).

16. See, e.g., *Peoples Loan & Fin. Corp. v. Bell*, 101 Ga. App. 595, 115 S.E.2d 218 (1960).

17. See *Ross v. Rambo*, 195 Ga. 100, 23 S.E.2d 687 (1942); *J. Jones*, *supra* note 4, at 25-29.

stituted value.¹⁸ Courts normally did not determine the adequacy of the value by measuring it against the worth of the goods obtained, but would set aside a conveyance if the value was so grossly inadequate as to put a reasonable person on notice that the transaction was fraudulent.¹⁹

Fourth, the requirement that the transaction be in the ordinary course of business served to withhold protection from a purchaser in situations where he should reasonably have been on notice that the transaction was fraudulent. Thus, under the common law doctrine, a purchaser who bought a television set from an automobile dealer would not take in the ordinary course, nor would a person buying at a foreclosure or judicial sale.²⁰ However, one buying from a dealer in those goods or a seller with whom he has had prior dealings of the same type was presumed to have taken in the ordinary course.²¹

Finally, the requirement of lack of knowledge of defective title caused the courts, as well as purchasers, considerable difficulty. Most courts agreed that the burden was on the purchaser to demonstrate that he took without knowledge.²² There was much dispute over whether knowledge was equivalent to notice and, if so, whether the concept of constructive notice should be applicable to the definition of a bona fide purchaser.²³ Traditionally, in this area of judicial interpretation, courts have been hostile toward using the concept of constructive notice.²⁴ If the doctrine of constructive notice is not applied in this area, there is no problem in holding, as most courts have, that knowledge is synonymous with notice.²⁵ This body of law was further confounded by the fact that some courts, which used the concept of notice, held that lack of notice meant more than mere absence of knowledge.²⁶ This construction appears to indirectly bring the concept of constructive notice into the definition.

18. *Clark v. Howell*, 163 Misc. 777, 298 N.Y.S. 232 (Co. Ct. 1937); *but cf. Van Cleve v. Meyers*, 108 N.J. Eq. 421, 155 A. 482 (1931).

19. *Rabbit v. Atkinson*, 44 Cal. App. 2d 706, 113 P.2d 14 (1941); *Dennis v. Smith*, 196 Kan. 539, 352 P.2d 405 (1960); *cf. Helena & Livingston S. & R.R. v. Northern Pac. Ry.*, 62 Mont. 281, 205 P. 224 (1922).

20. *Johnson v. 1st Nat'l Bank of Otis*, 108 Colo. 188, 115 P.2d 56 (1941); *Universal C.I.T. Credit Corp. v. Vogt*, 165 Neb. 611, 86 N.W.2d 771 (1957); *cf. Jarney v. Bell*, 111 F.2d 103 (4th Cir. 1940) (trustee in bankruptcy); *Vandin v. Henry McCleary Timber Co.*, 157 Wash. 635, 289 P. 1016 (1930) (execution creditor).

21. *Cf. Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 111 N.E.2d 871 (1953); *see text at infra* note 56 for the UCC codification of this principle.

22. *See, e.g., Mori v. Chicago Nat'l Bank*, 3 Ill. App. 2d 49, 120 N.E.2d 567 (1954); *Sterling Nat'l B. & T. Co. v. Brigante-Bernhardt Buick*, 201 N.Y.S.2d 113 (N.Y.C. Mun. Ct. 1960); *but cf. Starr Piano Co. v. Baker*, 8 Ala. 449, 62 So. 549 (1913) (Burden is on purchaser to establish everything *but* lack of knowledge).

23. *Compare Walden v. Downing Co.*, 4 Ga. App. 534, 61 S.E. 1127 (1908), *with Davis v. Lewis*, 187 Okla. 54, 100 P.2d 996 (1940).

24. *See United States v. Spring State Bank*, 150 F. Supp. 60 (E.D. Wis. 1957); *cf. Fogle v. General Credit, Inc.*, 122 F.2d 45 (D.C. Cir. 1941); *but cf. Holford v. Patterson*, 113 Tex. 410, 257 S.W. 213 (1923).

25. No matter which term was used, the result was the same. *See, e.g., Castner v. Ziemer*, 125 So. 2d 134 (Fla. 1960); *Shephard v. Van Doren*, 30 Cal. App. 700, 87 P.2d 90 (1936); *Concilla v. Bondy*, 353 Pa. 249, 44 A.2d 586 (1946).

26. *Dreyer v. Kicklighter*, 228 F. 744 (S.D. Ga. 1916); *cf. Bunne v. Petterman*, 52 N.M. 284, 197 P.2d 618 (1948).

There was also much confusion in the common law concerning what standard of knowledge to apply. The median standard was one of "reasonable diligence."²⁷ Thus, willful abstinence from inquiry constituted presumptive notice, and in instances of actual notice, such as information conveyed by the owner or the observance by the purchaser of a recorded chattel mortgage, the owner always prevailed.²⁸ In situations other than those mentioned above, judicial standards varied from requiring an affirmative effort by the purchaser to locate good title in the transferor to merely a lack of actual notice.²⁹

The majority of cases involving disputes between the owner and purchaser over the title to goods during the past half-century have concerned the fraudulent transfer of automobiles, and Automobile Title Certificate Statutes have caused the courts a good deal of consternation.³⁰ These statutes were held not to require the purchaser to search for title, but this is modified by the fact that some courts required the purchaser to at least request a title certificate.³¹ When the purchaser received a title certificate, the better reasoned cases held this to conclusively establish lack of knowledge or notice of the transferor's defective title.³² A further problem was created when encumbrances, such as security interests, were noted on the title certificate or other document of title. For rather questionable reasons, many courts did not consider this to constitute notice to the purchaser.³³

Voidable Title

Once the buyer had met the above standards and established himself as a bona fide purchaser, the doctrines of voidable title and estoppel were available to protect his title against the owner of the goods. The voidable title doctrine held that the transaction was only voidable between the owner and the transferor, and once the goods passed to a bona fide purchaser the owner's rights were lost.³⁴ Voidable title is to be distinguished from void title, where the trans-

27. See *Davis v. Kleindienst*, 64 Ariz. 251, 169 P.2d 78 (1946); *Tybrisa Co. v. Tybeeland, Inc.*, 220 Ga. 442, 139 S.E.2d 302 (1964); *Ex parte Dort*, 238 S.C. 506, 121 S.E.2d 1 (1961); *Richlands Buick Corp. v. Hurst Hardware Co.*, 80 W. Va. 746, 92 S.E. 685 (1917).

28. See, e.g., *A.C. Nelson Auto Sales v. Turner*, 241 Iowa 927, 44 N.W.2d 36 (1950); *Gilpin v. Jacob Ellis Realities*, 47 N.J. Super. 26, 135 A.2d 204 (1957); *Quality Shingle Co. v. Old Ore. Lumber & Shingle Co.*, 110 Wash. 60, 187 P. 705 (1920).

29. Compare *United States v. Christensen*, 50 F. Supp. 30 (E.D. Ill. 1943) with *Comm. Credit Corp. v. Pottmeyer*, 176 Ohio St. 1, 197 N.E.2d 343 (1964).

30. These statutes required that the title certificate be transferred to the purchaser at the time of the sale in order for the transaction to be valid. For a discussion of these statutes, see G. Bogert, W. Britton & W. Hawkland, *Cases & Materials on Sales & Security* 201-11 (4th ed. 1962).

31. Cf. *General Motors Acc. Corp. v. Hill*, 95 Ariz. 347, 390 P.2d 843 (1964); but cf. *Lux v. Lockridge*, 65 Idaho 639, 150 P.2d 127 (1944). A strong dissent in this case was one of the first expressions of what is now the majority view.

32. See *Patterson Motors Corp. v. Cortez*, 2 Ariz. Rep. 798, 408 P.2d 331 (1965).

33. *1st Nat'l Bank of Omaha v. Provident Fin. Co.*, 176 Neb. 45, 125 N.W.2d 786 (1963); but cf. *Merchants Bank of N.Y. v. McKenna*, 29 Misc.2d 50, 212 N.Y.S.2d 541 (Sup. Ct. N.Y. City 1961) (Recorded chattel mortgage is notice as a matter of law.).

34. R. Benjamin, *supra* note 4, at 409-10; S. Williston, *supra* note 15, at §§ 311, 348; cf. C. Schmithoff, *The Sale of Goods* 108-10 (2d ed. 1961) (Importance of distinction be-

feror's title is void *ab initio*, as in the case of a thief, and a bona fide purchaser can acquire no title to the goods. A basic premise of the doctrine of voidable title was that it be possible to infer a contract of sale between the owner and the transferor; thus it was critical that the owner intended to sell the goods.³⁵

The requirement of intent to sell engrafted two limitations on the doctrine of voidable title. The "cash sale" or "bad check" limitation provided that the owner intended to sell only for cash and that no title passed to the transferor until the cash was in the possession of the owner, and if the owner never received cash the transferor's title was void.³⁶ Therefore, if a check or draft was subsequently dishonored, the transferor acquired no title and could convey none. Recently, however, the courts have been moving away from this limitation and holding that a transfer for a bad check confers voidable title on the transferor.³⁷ One suggested reason for this is that in selling for a check or future payment the owner-seller waives his right to immediate cash payment.³⁸

The other limitation on the doctrine of voidable title concerned transactions where the bona fide purchaser took from a fraudulent transferor; although it was never quite clear what type of fraud would render the transferor's title void rather than voidable. The majority of courts held that title was void where the fraud was punishable as larceny.³⁹ The implication of this construction was that as long as the fraud was merely tortious, rather than larcenous, the transferor acquired voidable title. But, some courts went so far as to hold that no title passed to the transferor if the fraud was simply "wrongful and surreptitious."⁴⁰

A clear illustration of the fraudulent transfer limitation would be where *A*, who was hopelessly insolvent, represented himself to the owner as *B*, a prosperous merchant desiring to buy goods. In this situation, no title would pass to *A* on the theory that the owner intended to sell to *B*, the prosperous merchant. But, it is arguable that if *A*, in the same circumstances, merely held himself out to be solvent he would acquire voidable title and could freely convey the goods to a

tween voidable and void title diminishing in favor of principle that one who consents in fact that another person shall have possession of his goods shall lose title to them if they pass to a bona fide purchaser); but see UCC 2-403(2).

35. Williston, *supra* note 15, at §§ 311, 348; cf. Fryer v. Downard, 134 Ind. App. 225, 187 N.E.2d 105 (1963).

36. Gustafson v. Equitable Loan Ass'n., 186 Minn. 236, 243 N.W. 106 (1932); National Bank of Comm. v. Chicago B. & E.R.R. 46 N.W. 342 (1890); cf. Port Fin. Co. v. Ber, 45 So. 2d 404 (1950) (the same result was reached under civil law doctrine of *la possession vaut titre*); but cf., Hawkland, *Curing Improper Tender of Title to Chattels: Past, Present and Commercial Code*, 46 Minn. L. Rev. 697, 720 (1962) (UCC reverses result in Gustafson).

37. See, e.g., J.L. McLure Motors Co. v. McLain, 341 Ala. App. 614, 42 So. 2d 266 (1949); Crescent Chevrolet Co. v. Lewis, 230 Iowa 1024, 300 N.W. 260 (1941); see generally L. Vold, *supra* note 6, at 400-01.

38. Cf. Linton v. Citizens State Bank, 368 P.2d 92 (Okla. 1962).

39. See, e.g., Hewitt v. Malone, 105 Ga. App. 281, 134 S.E.2d 501 (1962); Amols v. Bernstein, 214 App. Div. 469, 212 N.Y.S. 518 (—Dep't 1925); but cf. Hawkland, *supra* note 36, at 720 (UCC also reverses Amols).

40. Panhandle Pipe & Supply Co. v. Pudey & Son, 125 Colo. 355, 243 P.2d 756 (1952).

bona fide purchaser.⁴¹ This theory necessitates deciding whether the owner must intend to sell to a person of a certain status or merely to a given physical being. The sounder decisions hold that, at least in face-to-face transactions, the owner intends to sell to the person before him and voidable title passes regardless of any misrepresentation.⁴²

Estoppel

Whether or not the bona fide purchaser brought himself within the voidable title doctrine, he might still protect himself by invoking the doctrine of estoppel. This doctrine rested on the notion that the person making the fraudulent transfer possible should bear the resulting loss, and became operative in situations where the owner had given the transferor some type of authority to dispose of the goods.⁴³ If the transferor had actual authority to sell the goods, the owner was clearly estopped from asserting his title against a bona fide purchaser.⁴⁴ However, the owner may also have been estopped by the transferor's apparent authority, and the problematic question was what the owner must do to create this authority.⁴⁵

Courts were unanimous in holding that bare possession of the goods by the transferor, unless he was a dealer in those goods, was not enough to create an estoppel: there must have been some activity of the owner sufficient to clothe the transferor with some indicia of title.⁴⁶ This principle was grounded on the theory that the owner must do something to mislead the purchaser into believing the transferor has authority to sell the goods.⁴⁷ Under the doctrine of estoppel, however, there was no clear indication of what the owner must do to clothe the transferor with some indicia of title. If it was found, even by implication, that the owner intended the transferor to sell the goods he was usually estopped.⁴⁸

41. *Cf. Dudley v. Lovins*, 310 Ky. 491, 270 S.W.2d 978 (1949).

42. *See Sullivan v. Larson*, 49 Neb. 97, 30 N.W.2d 460 (1948); *Kent v. Wright*, 198 Okla. 103, 175 P.2d 802 (1947).

43. *L. Vold, supra* note 6, at 173; *S. Williston, supra* note 15, at §§ 312-16. In England, the doctrine of market overt was also available to protect the bona fide purchaser. It was based on the theory that the owner had a duty to search for his goods in the market place, and whether the purchaser was protected usually depended on the definition of a market. This theory was never adopted in the United States. *See R. Benjamin, supra* note 4, at 12; *J. Jones, supra* note 4, at 33-49. As to whether the UCC adopts the theory of market overt, *see W. Hawkland, Sales and Bulk Sales* 104-06 (1958).

44. *See, e.g., Joel Strickland Enterprises v. Atlantic Discount Co.*, 137 So. 2d 627 (Fla. 1962). The authority, however, is limited to the right to sell; and does not include the right to otherwise encumber the goods, *Beyer v. Noble*, 81 Ga. App. 34, 57 S.E.2d 844 (1950).

45. The situation was made even more confusing by the fact that courts often used the terms estoppel and apparent authority interchangeably. *See, e.g., Western Produce Co. v. Citizens State Bank*, 113 S.W.2d 951 (1938).

46. *See Forsyth Storage & Transfer, Inc. v. William E. Cramer Co.*, 215 Md. 93, 136 A.2d 905 (1957); *Nelson v. Wolf*, 4 N.J. 76, 71 A.2d 630 (1950).

47. *Cf. National Resources, Inc. v. Wineberg*, 349 F.2d 685 (9th Cir. 1965), *cert. denied*, 382 U.S. 1010 (1966) (Cal. law); *Handley Motor Co. v. Wood*, 238 N.C. 468, 78 S.E.2d 391 (1953) (decided under Pa. law).

48. *See, e.g., Grasslands Water Ass'n v. Lucky Leven Land & C. Co.*, 112 Cal. App. 2d 776, 247 P.2d 380 (1952); *Finance Guaranty Co. v. Defiance Motor Truck Co.*, 145 Md. 94, 125 A. 585 (1924).

An owner, who has purchased goods from the transferor, was also estopped from contesting a conveyance by the transferor-seller to a subsequent bona fide purchaser if the owner allowed the transferor-seller to remain in possession of the goods.⁴⁹ Authorities were divided as to whether the mere negligence of the owner estopped him—generally it did not.⁵⁰

In the absence of any actual intent of the owner that the transferor sell the goods, if the owner knew a sale was likely to occur he was estopped; and recent decisions hold the owner estopped on the theory that he *should have known* the transferor contemplated selling the goods.⁵¹ No court has held the owner to a duty to inquire as to whether the transferor intends to sell the goods, but decisions in this area support the proposition that the owner will be estopped if he is grossly negligent.⁵² Also, judicial trends indicate that, if the owner was guilty of gross negligence or laches, he will be estopped even if the transferor's procurement of the goods was larcenous.⁵³

The purchaser's burden was to prove that he reasonably relied on the apparent authority of the transferor.⁵⁴ In summary, critical factors here have been whether the transferor is a dealer in those goods, prior dealings between the transferor and purchaser, and trade practices. It should be remarked that these factors are also crucial in determining whether the buyer is a bona fide purchaser, and courts finding that the buyer is a bona fide purchaser rarely used the doctrine of lack of reliance on indicia of title to defeat him.⁵⁵

UNIFORM COMMERCIAL CODE PROVISIONS

The purpose of the UCC, as stated in UCC 1-202(2)(a), is "to simplify, clarify and modernize the law governing commercial transactions." The keystone provision governing transactions between owner, fraudulent transferors and purchasers is UCC 2-403, which provides:

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though (a) the trans-

49. *Foss v. Towne*, 98 Vt. 321, 127 A. 294 (1925); R. Benjamin, *supra* note 4, at 731.

50. *Cf. Coveney v. Coveney*, 234 Wis. 637, 291 N.W. 818, 824 (1940).

51. *Jarbe Oil Co. v. Birdwell & Son Drilling Co.*, 335 S.W.2d 394 (1960).

52. *See Lambert v. Bradley*, 73 S.D. 316, 42 N.W.2d 606, 609 (1950); *Noxon v. Cockburn*, 147 S.W.2d 842 (Tex. 1941).

53. *Lakes v. Orley*, 240 P.2d 151 (Mont. 1966); *cf. Ava Hardware Co. v. Christenson*, 122 S.W.2d 92 (1938).

54. *See National Fin. Corp. of Cal. v. Stump*, 57 Cal. App. 2d 759, 133 P.2d 855 (1943); *cf. L.B. Price Mercantile Co. v. Gay*, 44 So. 2d 87 (Fla. 1950). Of course it is necessary that the purchaser change his position or suffer injury as a result of this reliance, *Reconstruction Fin. Corp. v. Metropolitan S.P. Corp.*, 287 N.Y. 857, 39 N.E.2d 309, 31 N.Y.S.2d 659 (1941); *Gastin v. Scott*, 80 Ga. App. 630, 56 S.E.2d 778 (1949).

55. *See Woodward Co-op Elevator Ass'n v. Johnson*, 207 Okla. 217, 248 P.2d 1002 (1952); *cf. Claybrooke W. & G. Co. v. Farmers Co-op W. & G. Co.*, 260 Ala. 518, 71 So. 2d 88 (Ala. 1954); *Speck Cadillac-Olds, Inc. v. Goodwin*, 373 Pa. 83, 95 A.2d 191 (1953).

feror was deceived as to the identity of the purchaser, or (b) the delivery was in exchange for a check which is later dishonored, or (c) it was agreed that the transaction was to be a "cash sale", or (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been such as to be larcenous under the criminal law.⁵⁶

In construing UCC 2-403, or any other operative section of the Code, it is crucial to pay close attention to the relevant definitional sections of the Code, found primarily in UCC 1-201.

The UCC does not mention a bona fide purchaser, but speaks instead of good faith purchasers for value and buyers in the ordinary course. Neither of these concepts is equivalent to a bona fide purchaser and the UCC provisions should now control. The concept of a good faith purchaser for value is applicable in situations which the common law dealt with by means of the doctrine of voidable title, *i.e.*, those now controlled by UCC 2-403(1). The UCC definition of a purchaser continues the common law definition, which excluded taking by devise; and a pledgor or lienor, unless specifically excluded, takes by purchase.⁵⁷ Goods are also defined as in the common law, but items that are not movable or could not be considered movable prior to the formation of the sales contract are excluded. Money is also excluded when treated as a medium of exchange, and the Code states that title can pass only as to goods which are existing and identifiable at the time of the transaction.⁵⁸ The UCC definition of good faith offers no great improvement over the common law definition: it includes observance of reasonable commercial standards of fair play and appears to involve a factual question of honesty in light of the particular circumstances of a case.⁵⁹ The concept of value is broadened by the UCC to include the acceptance of delivery and a binding commitment.⁶⁰

The concept of a buyer in the ordinary course is only applicable to entrustment transactions, which some courts have treated as an extension of the common law doctrine of estoppel.⁶¹ The distinction between a good faith purchaser for value and a buyer in the ordinary course is that a buyer in the ordinary course is more narrowly circumscribed by having to take from a dealer in

56. UCC § 2-403.

57. *Id.* §§ 1-201(33), (32); *see also id.* Comment 32.

58. *Id.* §§ 2-105(1), (2); *see supra* note 13 and accompanying text.

59. *Id.* § 1-201(19); *see supra* note 8 and accompanying text.

60. *Id.* § 1-201(44); *see supra* note 17 and accompanying text.

61. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 158, 281 N.Y.S.2d 400 (N.Y. Civ. Ct. 1967).

those goods. Official Comment 3 to UCC 2-403 indicates that the definition of a buyer in the ordinary course is meant to limit the class of persons who may acquire good title in an entrustment transactions, while at the same time eliminating the confusion and injustice that heretofore existed in these situations.

The common law doctrines of "bad check," "cash sale" and fraudulent transfer are specifically abolished by the UCC.⁶² Voidable title is now conferred on any transferor except a thief, and the status of the title in the hands of the purchaser now depends on the facts of that specific case rather than any general doctrine.⁶³ UCC 2-403 does not refer to any authority to sell which the owner must confer on the transferor, nor does it mention any requirement that the owner intend to sell the goods. These omissions, viewed in light of the definitions of entrustment and buyer in the ordinary course, imply that the drafters of the UCC intended to abolish the doctrines of apparent authority and intent. Of course, the drafters point out that the UCC in no way limits any right conferred on the purchaser by prior common or statutory law.⁶⁴

Thus, while continuing and clarifying much of the common law, the clear purpose of the UCC is to make goods more freely transferable by increasing the protection of purchasers. UCC 2-403 also reflects increased concern for the consumer-purchaser, as opposed to the merchant-purchaser or seller, which is most essential to a consumer oriented economy. There can be little doubt that the burden is now placed on the owner to insure the integrity of the transferor. But, regardless of the intentions of the drafters of the Code, their efforts are only successful to the extent courts interpret the UCC with reference to the expanded and revised legal principles set forth therein, as well as current economic realities. The following discussion is an attempt to assess the extent to which the Code is working as intended and, where it is not, suggest remedial action. Before analyzing the judicial treatment the UCC has received, it is necessary to establish a framework within which the UCC may be applied to various factual situations.

UNIFORM COMMERCIAL CODE CASE LAW

Methodology

UCC 2-403 presents its own methodology for reconciling the interests of the owner and the interests of the purchaser in goods which have passed by a fraudulent transfer. This methodology demands a step-by-step analysis as follows:

(1) It first must be ascertained whether the purchaser is a buyer in the ordinary course.⁶⁵

62. UCC §§ 2-403(1) (a-d).

63. *Id.* § 2-403, Comments 1, 2.

64. *Id.* § 2-403, Comment 1.

65. Implicit in this methodology is the premise that, by UCC definition, a buyer in the ordinary course is also a good faith purchaser for value. See *Id.* §§ 1-201(9), (19), (33), (44).

(2) If the purchaser is found to be a buyer in the ordinary course, it must then be determined whether the transaction between the owner and transferor falls within the Code definition of entrustment. Where it does fall within this definition, UCC 2-403 dictates that the purchaser will prevail.

(3) If the purchaser is not a buyer in the ordinary course, or the transaction is not one of entrustment, the next step is to decide if the purchaser is a good faith purchaser for value. Should the purchaser not meet this definition, nor the definition of a buyer in the ordinary course, the owner will prevail because the UCC only extends protection to good faith purchasers for value and buyers in the ordinary course.

(4) Where the purchaser is a good faith purchaser for value, it must be determined whether the transferor has such power to transfer as would enable him to pass good title under UCC 2-403. Should the transferor not have such power, *i.e.*, if he is a thief, the owner will be able to recover the goods from the purchaser.

As the following discussion will indicate, courts have not always followed this methodology. While in many cases an identical result would have been obtained under the method of analysis set forth above, problems arise from the fact that the loose analysis in many of these cases may be relied on by future courts deciding similar cases. The effectiveness of the UCC depends on judicial construction, and it is desirable that this construction be grounded on a sound analysis of the factual patterns presented by the cases. Consideration of several cases under the UCC will highlight some of these problems.

The Position of the Purchaser

The problems of the UCC purchaser are attenuated by the fact that the courts have not always distinguished between situations where the definition of a good faith purchaser for value applies and those where the definition of a buyer in the ordinary course applies. Thus, purchasers falling within either definition have been defeated because they did not rely on any paper title or other evidence of ownership in the transferor.⁶⁶ This was a limitation the common law placed on the doctrine of estoppel and, accepting the contention that the UCC definition of entrustment is an extension of estoppel, should at least not apply to a good faith purchaser for value, because this definition is only applicable to voidable title situations. The UCC definition of a buyer in the ordinary course, in UCC 1-201(9), also does not require any reliance on indicia of title, but rather defines a buyer in the ordinary course as a "person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in the ordinary course."

An early (1956) Pennsylvania case held that the purchaser would not

66. See, *e.g.*, *Kovatch v. Hyde*, 47 Luz. L.R. 13 (Ct. of Common Pleas of Luzerne Co., Pa. 1956).

be protected because he did not rely on any indicia of title in the transferor.⁶⁷ The court thought this determination dispositive of the case and did not consider whether the purchaser might be a good faith purchaser for value or a buyer in the ordinary course. Ten years later, another Pennsylvania court came to the same conclusion in a case of entrustment.⁶⁸ This court did distinguish between a good faith purchaser for value and a buyer in the ordinary course but held that reliance was necessary in the latter instance. What these courts failed to note is that UCC 2-403 transcends the notion of reliance and makes the *fact* of entrustment itself sufficient. At most, reliance on such indicia should only be relevant as evidence, introduced by the purchaser, to show that he took without knowledge and in good faith.

The irrelevance of reliance, as used by the common law, under the UCC is well illustrated by a recent decision of the Pennsylvania Supreme Court.⁶⁹ The court held that the purchaser could prevail over the owner, as a good faith purchaser for value, even though he neither received or requested a title certificate to an automobile obtained from a fraudulent transferor. Under the common law, the purchaser's failure to request a title certificate usually would have defeated him on the theory that he had no evidence of title on which to rely.⁷⁰ This decision also underscores the attempt of the Code to modernize commercial law.⁷¹

The common law theory of the purchaser's notice of his transferor's defective title has also been used by courts, in ways not contemplated by the UCC, to defeat purchasers.⁷² This theory has been used despite the fact that neither the UCC definition of a buyer in the ordinary course nor the definition of a good faith purchaser for value requires the purchaser to *know* that the transferor has the ability to convey good title, but merely requires the purchaser *not to know* that the sale to him violates the ownership rights of a third party.⁷³ Thus, as with reliance on indicia of title, the only relevance the purchaser's knowledge of the transferor's ability to convey good title should have is as evidence of the purchaser's good faith.

Nonetheless, two decisions under the UCC have pushed the concept of notice to the extreme. In *DePaulo v. Williams Chevrolet-Cadillac, Inc.*, the purchaser's car was wrecked and towed to the garage of the transferor, who was also a dealer in new and used cars.⁷⁴ The transferor then offered to obtain a new

67. *Id.* For a similar discussion of this case see G. Bogert, W. Britton & W. Hawkland, *supra* note 30, at 217-18.

68. *DePaulo v. Williams Cadillac-Chevrolet, Inc.*, 10 Leb. Co. Legal J. 465 (Ct. of Common Pleas of Lebanon Co., Pa. 1966).

69. *Main Investment Co. v. Gisolfi*, 203 Pa. Super. 199 A.2d 535 (1964).

70. See *supra* note 31 and accompanying text.

71. See *supra* p. 12.

72. *DePaulo v. Williams Cadillac-Chevrolet, Inc.*, 10 Leb. Co. Legal J. 465 (1966); *Al Maroone Ford v. Mannheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 190 (1965), *rev'g* 59 Lanc. L. Rev. 291 (1964).

73. See UCC §§ 1-201(9), (19).

74. 10 Leb. Co. Legal J. 465 (Ct. of Common Pleas of Lebanon Co., Pa. 1966).

car for the purchaser, who accepted the offer and paid for the car at that time, although the new car was not yet on the transferor's lot. The transferor obtained the car from the owner for a worthless check. Upon these facts, the court held that the owner could reclaim the car from the purchaser. Its decision rested in part on the theory that, because the transferor did not have the car in his possession at the time the purchaser paid for it, the purchaser should have been on notice that the transferor did not have good title.

The lack of possession by the transferor limitation, which is often used in the same manner as notice, implies that a purchaser should be protected only when he buys out of inventory. In a second decision, the Pennsylvania Supreme Court recently interpreted Official Comment 2 to UCC 9-307 as authority for the proposition that the purchaser is protected only when he buys out of inventory.⁷⁵ However, this comment says only that that section applies *primarily* in situations where the purchaser buys out of inventory—not exclusively: there is no authority in the UCC for protecting only a purchaser who buys out of inventory. Even if it were suggested that this proposition merely gives rise to an evidentiary presumption that one not buying out of inventory does not take in good faith, such a presumption would be contrary to both common law and UCC notions of good faith.⁷⁶

Moreover, this proposition would contravene economic realities. In a great many transactions involving major purchases, such as automobiles, furniture and appliances, the merchant-seller orders the goods for the purchaser rather than delivering them out of his own inventory. Insofar as good faith is predicated on commercial reasonableness, not buying out of inventory certainly would not show bad faith. Also, these transactions clearly transpire in the ordinary course of business.

The Code does not require the purchaser to know that his transferor has good title to the goods, and UCC 2-403(2) does not even require the purchaser to know that the transferor is a dealer in those goods. In the absence of such a requirement, it is a fair inference that the Code imposes an objective standard: the transferor must appear to a reasonable man to be a dealer in those goods. The Code definition of a merchant fortifies this contention and clears up a point of confusion in the common law, but courts have continued to apply a subjective standard to defeat purchasers who do not know that their transferors are dealers in those goods.⁷⁷

For example, a New York case decided last year involved the fact the purchaser was a dealer in junk cars and, according to trade practices, should have known better than to purchase a car from a private individual without

75. *Al Maroonie Ford v. Mannheim Auton Auction, Inc.*, 205 Pa. Super, 208 A.2d 190 (1965).

76. See UCC § 1-201(19) and *supra* note 10 and accompanying text.

77. See *supra* pp. 5-6. The UCC good faith standard of commercial reasonableness, found in UCC § 1-201(19), also points to an objective standard.

receiving any evidence of title.⁷⁸ The court recognized that the purchaser did not meet the UCC good faith standard of commercial reasonableness and would not be protected by UCC 2-403, but went on to hold for the owner on the theory that the purchaser did not know that the transferor was a dealer in those goods. This analysis was not only unnecessary to a proper disposition of the case but threatens to limit the freedom of transferability of goods intended by the UCC.

Regardless of whether the purchaser is a good faith purchaser for value or a buyer in the ordinary course, he still must give value for the goods. The UCC 1-201(44) definition of value clarifies the common law definition by the inclusion of several specific provisions, such as stating that value is "any consideration sufficient to support a simple contract." This emphasizes that the drafters of the Code did not intend the adequacy of the value to be a relevant factors as long as some consideration passed to the transferor. They recognized that in the ordinary course of business both buyers and sellers desire to enter into transactions most favorable to themselves. This fact, however, is not always recognized by the courts.⁷⁹

In a 1967 Arkansas case, decided under the UCC, goods stipulated to be worth over \$1,000 were sold for \$500.⁸⁰ The court held that although value was given, the purchaser was not a good faith purchaser for value because the inadequacy of the price should have put him on notice that the transaction was fraudulent. The UCC definition of good faith also does not require that the value given be equal to what the goods are worth, and even under common law the value given would have supported a simple contract.⁸¹ There is nothing dishonest about a bargain purchase, and such purchases are clearly within commercially reasonable standards of fair play as evidenced by trade usage.

There are cases, primarily in the area of secured transaction, indicating that merchant-buyers who take from consumer-sellers, either for cash or by way of trade-in, would not be protected by UCC 2-403.⁸² Since consumers are not in the business of dealing with any kind of goods, a purchaser from a consumer would not take from a dealer in those goods and would not be protected by UCC 2-403(2). However, in Article 2 transactions, there is no reason why a merchant-buyer could not be a good faith purchaser for value from a consumer-seller. Subject to the good faith limitation, as long as the consumer did not have the goods on a trial, or on another provisional basis he should be able to convey good title to a merchant-buyer and cut off the rights of the true owner.

A variety of other types of purchasers have been held not protected by

78. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 158, 281 N.Y.S.2d 400 (N.Y. Civ. Ct. 1967).

79. *Hollis v. Chamberlin*, 243 Ark. 201, 419 S.W.2d 116 (1967).

80. *Id.*

81. See *supra* note 15 and accompanying text.

82. See, e.g., *United Gas Improvement Co. v. McFalls*, 56 Lanc. L. Rev. 431, 18 Pa. D. & C. 713 (Ct. of Common Pleas of Lancaster Co. 1959).

UCC 2-403. A purchaser who buys at a forced auction sale was held not to take in the ordinary course and did not come within UCC 2-403(2).⁸³ Additionally, it appeared in that case that the purchaser was not even a good faith purchaser for value. This holding is consistent with UCC 1-201(22), which defines purchases and embodies the notion that the owner must voluntarily part with his goods: a forced sale is not voluntary.

Several courts have held that UCC 2-403 does not enable a trustee in bankruptcy to prevail over the owner of the goods.⁸⁴ The fact that he is found not to meet the definition of a purchaser follows the theory, espoused by the United States Court of Appeals for the Third Circuit in *In re Kravitz*, that the Federal Bankruptcy Act makes the trustee a lien creditor and UCC 2-403(4) refers to Articles 6 and 9 as the only articles covering a lien creditor's rights.⁸⁵

The distinction between the common law doctrines of notice and good faith and the UCC requirement of observing reasonable commercial standards of fair dealing was demonstrated by a 1961 decision of the Pennsylvania Supreme Court.⁸⁶ In that case, both the transferor and purchaser were corporations, and had interlocking directors, shareholders and employees. The court held that the UCC good faith concept of commercial reasonableness had been violated. This holding not only avoids applying the common law doctrine of notice, but reinforces the UCC policy of making the result of any case turn primarily on its circumstances.⁸⁷

Voidable Title and UCC 2-403(1)

The thrust of UCC 2-403(1) is to limit the applicability of the concept of void title to instances where the transferor is a thief. The section implies that, in situations formerly covered by the common law doctrine of voidable title, the intent of the owner to part with the goods is no longer controlling.⁸⁸ The rule may be emerging that a good faith purchaser for value acquires good title unless he takes against the express will of the owner. Several courts interpreting the UCC, however, have reverted to the common law doctrines specifically abolished

83. *National Shawmut Bank of Boston v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967).

84. See, e.g., *Matter of Kline*, 49 Berks. L.J. 56 (E.D. Pa. 1956); *Matter of Kretzer*, 48 Berks. L.J. 121 (E.D. Pa. 1955). For an excellent discussion of the issues dealt with herein in relation to bankruptcy, security interests and negotiable instruments, see *Philadelphia Nat'l Bank v. Irving R. Boody Co.*, 1 U.C.C. Rep. Serv. 560 (1963), commented on by the referee in *Funk, Trust Receipt v. Warehouse Receipt—Which Prevails When They Cover the Same Goods?*, 19 Bus. Law. 627 (1964).

85. 278 F.2d 820 (3d Cir. 1960).

86. *Taylor Motor Rental, Inc. v. Associates Discount Corp.*, 196 Pa. Super. 182, 173 A.2d 688 (1961).

87. See *supra* note 63 and accompanying text.

88. UCC § 2-403, Comment 1 states that a good faith purchaser for value is protected "in a number of specific situations which have been troublesome under prior law." This trouble stemmed primarily from the fact that, for the purchaser to be protected, the owner must have intended to part with the goods. See *supra* note 35 and accompanying text.

by the Code or, while acknowledging this abolition, have construed other provisions of the UCC in such a manner that the purchaser has been defeated in situations where a proper analysis under the Code would have enabled him to prevail.⁸⁹

The major use which courts have made of the common law limitation that the owner did not intend to part with the goods is in arriving at the common law result under the cash sale doctrine, which was abolished by the UCC. In *DePaulo*, the court pointed out by dicta that no title passed to a purchaser because the owner did not intend to part with the goods until he received cash for them.⁹⁰ This language is directly contrary to the UCC 2-403(1) abolition of the cash sale doctrine and intent limitation. It is also the type of loose analysis that may have detrimental precedential value.⁹¹

UCC 9-307(2), which states that a buyer of consumer goods takes free of a security interest created by his seller unless the buyer knows the sale to him is in violation of the terms of that agreement, has been mis-used to defeat a purchaser for want of a proper application of UCC 2-403.⁹²

The factual pattern of *Dunford v. Columbus Auto Auction Sales* illustrates the depth of analysis necessary under the UCC. The transferor, a dealer, had cars on a floor plan arrangement with the owner.⁹³ The transferor then sold a car to the purchaser, who in turn resold the car to the transferor for a worthless check. When the car was back in the possession of the transferor, the owner reclaimed it. Thus, for the purposes of the relevant transaction, the transfer from the purchaser to the transferor, the purchaser was in the position of an owner and the transferor in the position of a purchaser under UCC 2-403. Although UCC 9-307(2) operated to protect the initial purchaser in the first transaction, it was inoperative as to the second transaction because it speaks of a security interest created by the seller; and, in this situation, the security interest had been created by the buyer.

The *Dunford* court found in favor of the initial purchaser on the theory that UCC 9-307(2) protected him.⁹⁴ It failed to distinguish between the two transactions and was reluctant to apply UCC 2-403 because that would have necessitated confronting the provision that empowers a person, here the transferor, who acquires goods for a worthless check to convey them to a good faith purchaser for value. Both the court's reluctance and holding were unnecessary for

89. See, e.g., *Cash Loan Co. v. Boser*, 149 N.W.2d 605, 34 Wis. 2d 410 (1967). That court utilized UCC § 9-307(2), which permits a buyer in the ordinary course to take free of a security interest even though he knows of it. It held that, since the transferor only had the goods on consignment, no title passed to the buyer. No inquiry was made as to whether the consignment of goods constitutes entrustment—which it undoubtedly does.

90. *Leb. Co. Legal J.* 465 (Ct. of Pleas of Lebanon Co., Pa. 1966).

91. For a proper analysis of this issue, see *Humphrey Cadillac & Oldsmobile Co. v. Sevard*, 229 N.E.2d 365, 85 Ill. App. 2d 64 (1967).

92. *Dunford v. Columbus Auto Auction Sales*, 114 Ga. App. 407, 151 S.E.2d 464 (1966).

93. *Id.*

94. *Id.*

the reason that the case presented evidence which indicated that neither the owner nor the transferor could have met the Code standard of good faith.⁹⁵

Even courts which hold that a transferor who acquires goods for a bad check can convey good title to a good faith purchaser for value do so hesitatingly and appear unwilling to rest their decisions squarely on UCC provisions. In what usually amounts to dicta, these courts endeavor to set forth common law grounds for their decisions.⁹⁶ The problematic aspect of this procedure is that it makes it difficult for future courts to ascertain precisely what emphasis prior courts have placed on the UCC.

For example, where the transferor has automobiles on a floor plan with the owner, UCC 2-403(2), absent proof that the purchaser is not a buyer in the ordinary course, should enable the purchaser to prevail as a matter of law.⁹⁷ Floor planning is the paradigm of entrustment, and the only inquiry should be as to the status of the purchaser. Albeit, in such a case the Wisconsin Supreme Court emphasized that, under the terms of a state statute, the owner's negligence served to defeat him.⁹⁸ This type of common law reasoning greatly nullifies the effect of the UCC. Although UCC 1-103 indicates supplementary common law principles may be applied where necessary, it is not authority for applying such principles, in cases where the Code is applicable, instead of applying UCC principles. Common law principles should be resorted to only where an exhaustive analysis of the Code does not serve to resolve the issues.

Entrustment

Generally, purchasers have not fared as well under the entrustment provisions of UCC 2-403(2) as they have under 2-403(1). Part of the problem in this area is due to the failure of the courts to properly interpret the definitional sections of the Code. For instance, UCC 2-104(1), which defines a merchant for the purposes of Article 2, does not mention the quantum of business a person must transact to be a merchant but simply defines a merchant as:

[A] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker

95. In addition, the owner appeared to claim as a creditor, rather than an owner, and UCC § 2-403 does not protect creditors.

96. See, e.g., *Hudiberg Chevrolet, Inc. v. Ponce*, 17 Wis. 2d 28, 116 N.W.2d 252 (1962).

97. Floor planning is an arrangement whereby most new car dealers acquire their automobiles from the manufacturer. It is similar to consignment in that the manufacturer retains title to the automobiles until they are sold. Under common law, there was some dispute whether the manufacturer was bound to convey title to a purchaser even though the dealer failed to pay the manufacturer for the car. Compare *Patterson Motors, Inc. v. Cortez*, 2 Ariz. 298, 408 P.2d 231 (1965) (Purchaser protected under common law.), with *Charles S. Martin Dist. Co. v. Banks*, 111 Ga. App. 538, 142 S.E.2d 309 (1965) (Under UCC purchaser protected as a matter of law.).

98. *Hudiberg Chevrolet, Inc. v. Ponce*, 17 Wis. 2d 28, 116 N.W.2d 252 (1962).

or other intermediary who by his occupation holds himself out as having such knowledge or skill.⁹⁹

By this definition, a person who "deals in goods of the kind" only as a sideline should qualify as a merchant.

In spite of this definition, one of the first cases under the UCC in this area held that the transferor, who "dabbled in used cars" was not a merchant and could not convey good title to a buyer in the ordinary course.¹⁰⁰ This decision not only erroneously imposed a quantum of business limitation on the definition of a merchant but failed to consider the language of UCC 2-104(1) which includes within the concept of a merchant one who only holds himself out as having skill or knowledge, and which fortifies the contention that UCC 2-403 contemplates the use of objective standards.¹⁰¹ Applied under an objective standard, the measure of the quantum of business a merchant transacts might have some utility in determining whether the transaction was in the ordinary course of business, *i.e.*, in answer to the question of whether a reasonable man would expect to be able to purchase similar goods from the transferor.

The language of UCC 2-403(3), ". . . any acquiescence in retention of possession," implies that what the owner does, or does not do, to put the transferor in possession, and what the transferor does to remain in possession, is irrelevant. Delivery of some nature by the owner and possession by the transferor are the critical factors. The proper construction of UCC 2-403(2), (3) is that possession of the goods by the transferor represents that he has title to them.¹⁰² There is no hint of the common law doctrine of estoppel in such a construction.

A recent New York opinion, however, stated that the UCC concept of entrustment is merely an extension of estoppel.¹⁰³ Thus, according to the court, it would still be necessary for: (1) the owner to confer some indicia of title on the transferor-entrustee; (2) for the owner to know that the transferor-entrustee is a dealer in those goods; and (3) for the purchaser to rely on the transferor's apparent authority. These requirements are identical to those of the common law doctrine of estoppel, and this holding, therefore, effectively read UCC 2-403(2), (3) out of the UCC.¹⁰⁴

99. UCC § 2-104(1).

100. *Kovatch v. Hyde*, 47 Luz. L.R. 13 (1956).

101. See *supra* note 76 and accompanying text.

102. As the court in *Humphrey Cadillac & Oldsmobile Co., Inc. v. Sevard*, 229 N.E.2d 365, 85 Ill. App. 2d 64 (1967) pointed out that UCC § 2-403(2) extends the mercantile theory of transferability, which the common law applied primarily to negotiable instruments and documents of title, to goods generally. This theory did not depend on any estoppel but simply upon a representation that title was in the transferor. See generally S. Williston, *supra* note 16, at 606-07.

103. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 158, 281 N.Y.S.2d 400 (N.Y.C. Civ. Ct. 1967).

104. See UCC § 2-403, Comment 2, which indicates that the definition of a buyer in the ordinary course is intended to remove "limitations on the proper protection of buyers in the ordinary market" without resulting in either "confusion or . . . injustice (such as that

UCC 2-403(3) specifically provides that an entrustment will result even if the procurement of the entrusting was such as to be larcenous under the criminal law. This, of course, is consistent with UCC 2-403(1)(d), covering voidable title, and the general notion of voluntary transfer embodied in UCC 2-403. As the Florida Supreme Court pointed out, when the owner voluntarily parts with his goods, even though induced to do so by a criminal act, an entrustment results and the owner's rights will be lost to a buyer in the ordinary course.¹⁰⁵ Although this situation is still distinguished from instances where the transferor is a thief and no title passes, questions of larcenous fraud should no longer be troublesome to the courts.

This prediction, however, does not coincide with the decided cases, where, particularly in instances of conversion, there still appear to be problems concerning the distinction between fraudulent and larcenous transfers. In *Linwood Harvestores v. Cannon*, from a rather unclear statement of facts, it appeared the transferor, who may have been either the agent of a leasing corporation or the principal corporation, had some authority to deal with the goods.¹⁰⁶ The extent of that authority was not ascertainable. The court held that if the purchaser took directly from the agent he acquired no title, but if he took from the principal corporation he acquired good title.¹⁰⁷ This distinction seemed to be based on the theory that in the former circumstance the entrustment was criminally induced, whereas in the latter it was only fraudulently induced. It does not rest on the notion that the agent might have been a thief, which is the only relevant distinction under UCC 2-403. The court remanded the case with directions to the trial court to make specific findings of fact on the purchaser's good faith. This is not relevant to the issue, and the question before the trial court should have been whether the goods were stolen or merely procured by larcenous fraud.

UCC 2-403(2) should enable a subsequent purchaser, who is able to establish that he is a buyer in the ordinary course, to prevail over an initial purchaser-owner who leaves the transferor-seller in possession of the goods; in fact, it is difficult to think of a clearer example of entrustment. Along with instances of floor planning, such a situation should constitute entrustment as a matter of law. As UCC 2-403(3) does not set forth any length of time for which the transferor must be in possession of the goods, it appears that an initial purchaser-owner who leaves goods he has just purchased in possession of the seller-transferor for even a few minutes would lose them to a subsequent buyer in the ordinary course. Thus, the burden is placed on the initial purchaser-owner to insure that any goods which he leaves with his seller will not be resold.

worked by common law doctrines such as apparent authority) to proper dealings in the normal market."

105. *Southeast Frozen Foods, Inc. v. Penguin Foods, Inc.*, 203 So. 2d 39 (Fla. 1967).

106. 427 Pa. 434, 235 A.2d 377 (Pa. 1967).

107. To acquire the goods, it appeared that the agent would have had to forge corporate documents. The principal corporation would have acquired them by what may be described as common business fraud.

Notwithstanding this analysis, in a 1967 Arizona case to which the foregoing analysis is applicable, the court applied the common law doctrine of laches.¹⁰⁸ The court held that the laches of the owner placed the burden of proof on him to show why he had not previously asserted his title and remanded the case to the trial court with instructions to make findings of fact on that issue, rather than holding for the purchaser under UCC 2-403(2) as a matter of law.

Other courts, while accepting the UCC's position that bare entrustment gives the transferor power to convey good title to a buyer in the ordinary course, continue to apply the doctrine of estoppel.¹⁰⁹ The only mention of estoppel in the Code simply indicates that the purchaser's rights under estoppel are in no way diminished by the Code.¹¹⁰

The ease with which the transition from common law principles to UCC principles can be made was pointed out by the Kentucky Supreme Court over 10 years ago. Prior to passage of the UCC in Kentucky, the court was faced with a situation where the owner purchased goods from the transferor and later returned these goods to the transferor for repairs, and the transferor then sold them to a subsequent purchaser. The court held for the owner on the theory that he had given the transferor no apparent authority. The court went on to indicate that, had Kentucky enacted the UCC, they thought UCC 2-403(2) would require an opposite result. Their construction of that section was correct in that the retransfer of the goods to the transferor, who was a dealer in those goods as well as a repairer of them, would have constituted entrustment.¹¹¹ The court also resolved any theoretical difficulties in relating common law doctrine to the UCC by pointing out that the requirement that entrustment be to a merchant who deals in those goods is sufficient to give rise to an implied authority to sell.¹¹² Although the better theoretical resolution is that the concept of authority is irrelevant under the UCC and the fact of entrustment alone is sufficient to enable the purchaser to prevail, it is nonetheless regrettable, now that the UCC is in force in most states, that courts do not always follow this enlightened lead.

CONCLUSION AND PERSPECTIVE

To properly evaluate the manner in which courts apply UCC 2-403 it is necessary to consider the context in which most of the cases under UCC 2-403, as well as the prior common law, have arisen. First, by the time the owner and purchaser have taken their dispute to court, the transferor is usually insolvent, in jail or in Rio. Therefore, it cannot be maintained that the effect of any hold-

108. *Lochhead v. G.A.C. Fin. Corp. of Camelback*, 6 Ariz. App. 539, 434 P.2d 655 (Ariz. 1967).

109. *See, e.g., Hudiberg Chevrolet, Inc. v. Ponce*, 17 Wis. 2d 28, 116 N.W.2d 252 (1962).

110. UCC § 2-403, Comment 1.

111. *Adkins v. Damron*, 324 S.W.2d 489 (Ky. 1959).

112. *Id.* On this point *see also* *United States v. Haddix & Sons, Inc.*, 268 F. Supp. 825 (E.D. Mich. 1967).

ing in this area is to prevent fraud—the damage has already occurred.¹¹³ While it is undeniably sound policy to prevent commercial fraud, this is not the function of the UCC. Rather, the purpose of the Code is to provide guidelines for resolving commercial disputes. Any measure of fraud prevention must be found in the criminal law, Federal Bankruptcy Act, Automobile Title Certificate Acts, and recording acts.¹¹⁴

Furthermore, whereas American society previously was economically production oriented, today it is economically consumption oriented, *i.e.*, the question is no longer whether enough can be produced to meet consumer demands but whether enough can be consumed to meet production demands.¹¹⁵ It is now necessary to promote and protect consumption. One has only to note the mass of advertising with which the consumer is bombarded and the mass of sellers with which he deals to realize upon whom the burden of insuring the integrity of the middleman should be placed; it is unrealistic to place it on the consumer. Most owners, including individual non-merchants, have some type of insurance to cover the loss of their goods, but few purchasers have insurance to cover losses incurred due to defective title.¹¹⁶ At any rate, the owner-merchant can pass any loss of this type along—to the consumer.

An analysis of cases enables one to posit a model UCC 2-403 case.¹¹⁷ An individual consumer buys major consumer goods for his own use from a merchant-dealer in those goods who in turn is likely to have the goods on consignment, or under some other contractual or financial arrangement, from the manufacturer, a distributor or a financing agency. Then, for a number of reasons, the merchant does not pay the manufacturer for the goods, which he has already sold to the consumer; and the manufacturer, or his subrogee, attempts to reclaim the goods from the consumer.

This picture belies the sympathy of the common law for the small merchant-owner who was divested of his goods by fraud. No case has been found under

113. *But see* Comment, 72 Yale L.J. 1205, 1217-25 (1963).

114. *See* UCC § 2-403, Comment 2.

115. *Cf.* J. Galbraith, *The Affluent Society* ch. X (1958).

116. Even private individuals often have household insurance to cover thefts.

117. The 31 UCC cases analyzed indicate that the parties referred to in this comment as owner, transferor and purchaser may be broken down as follows: (Data in percentages)

	Owner	Transferor	Purchaser
Manufacturer or Agent	42		
Retail Merchant-Dealer in Those Goods	26	45	20
Financing Agency	32		
Debtor		17	
Bankrupt		17	
Individual-Consumer		17	59
Creditor			17
Thief		4	
United States Government			4

Additionally, 84% of the transactions dealt with major consumer goods, such as automobiles; 55%, other vehicles and appliances. A sample of 67 recent cases, not decided under the UCC, revealed results similar to those presented above.

the UCC in which a consumer-owner was divested of his title by the operation of UCC 2-403. The only situation in which a consumer-owner might lose title to a merchant under UCC 2-403(1) would be where one consumer sold goods to another consumer for a worthless check, and the consumer-buyer then either traded-in or sold the goods to a merchant, who presumably holds them for resale. Since the result of holding for the merchant in this situation is to promote the free transfer of goods and consumption, by enabling subsequent purchasers to freely take from this merchant, there is no reason why the merchant in this instance should not be protected as any other purchaser.

Given current economic and social conditions, and noting that the UCC attempts to translate sound economic and social policy into legal principles, many of the cases discussed herein indicate that UCC 2-403 has always been successful in this task. This comment has suggested that part of the problem may lie in the lack of a sound analysis of the UCC. This problem is all the more perplexing when one considers that the drafters of the Code, through their comments, have made clear the reasons behind the UCC; but the underlying reasons of other statutes, which are analyzed much more soundly, are often unstated. Due to the recency of the UCC and the fact that its validity can only be tested by concrete factual situations as evidenced by decided cases, it is crucial that these cases be subject to critical legal analysis. To the extent such analysis affirms the validity of the UCC, it may lessen some of the scepticism concerning the Code or, on the other hand, point toward changes.

Legislation is pending to protect the consumer in a variety of new ways. He will be protected when borrowing money and purchasing insurance. The consumer will be assured of better quality meat, fish and poultry, and will be protected against the hazards of fire, radiation and gas leakage connected with certain goods. There is also agitation to overturn many cherished common law doctrines and grant the consumer greater protection when dealing with real property.¹¹⁸

UCC 2-403 ostensibly is already available to protect the consumer's title to goods. The question remains, does it protect him enough? For instance, why should not a consumer, who is a good faith purchaser for value, be able to acquire good title from a thief? It is economically sounder for the loss to fall on the owner-manufacturer or, as is more likely, his insurance company. Even if the owner is an individual, his interests as a consumer would not be harmed.

DONALD MERRITT

118. See Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 Geo. L.J. 519 (1966).